1991

For-Shor Company v. David W. Early, Savage Construction Company, State-wide Construction, Tim Savage : Brief of Appellant

Utah Supreme Court

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Allan M. Metos; Counsel for Respondent.

91-0427-CA

IN THE SUPREME COURT

OF THE STATE OF UTAH

FOR-SHOR COMPANY, a Utah corporation, Plaintiff, vs. DAVID W. EARLY, TRUSTEE; SAVAGE CONSTRUCTION COMPANY; STATEWIDE CONSTRUCTION; and TIM SAVAGE; Defendants.	CASE NO. 910024 PRIORITY NO. 16

APPELLANT'S BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY

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LIST OF PARTIES

A. PUTATIVE INTERVENOR/APPELLANT

Labor Services, Inc.

B. DEFENDANT/RESPONDENT

David W. Early

C. PLAINTIFF (NOT A PARTY TO THIS APPEAL)

For-Shor Company

D. DEFENDANTS (NOT A PARTY TO THIS APPEAL)

Savage Construction Company
Statewide Construction
Tim Savage

IN THE SUPREME COURT

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I. JURISDICTION AND NATURE OF PROCEEDING

A. Jurisdiction. The Utah Supreme Court has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2-2(3)(i) (1987 & Supp. 1991) since this appeal is taken from an Order Denying Motions to Intervene and for Declaratory Judgment (the "Order"). The Order is a final order of the Third Judicial District Court of Salt Lake County, over which the Utah Court of Appeals does not have original appellate jurisdiction.

The Order denies Labor Services, Inc.'s ("LSI") motion to intervene in the above-entitled action. An order denying an application for intervention which makes a final disposition of the claims and assertions of the applicant is appealable. Tracy v. University of Utah Hosp., 619 P.2d 340, 341 (Utah 1980). The Order finally disposes of LSI's claims and assertions based on LSI's right to intervene in this action to foreclose a mechanic's lien.

B. Nature of Proceeding. Commencing July 14, 1989, and continuing until October 19, 1989, LSI provided temporary labor services for the construction of a new residence pursuant to an agreement with the general contractor. LSI did not receive payment and timely filed a Claim and Notice of Mechanic's Lien (the "Notice of Lien"). On October 23, 1990, LSI filed a motion to intervene in this action.

LSI appeals from the Order and separate Ruling on Labor Service Inc.'s Motion to Intervene (the "Ruling") of the Third

Judicial District Court of Salt Lake County, Leonard H. Russon presiding. The trial court held that LSI's action to foreclose a mechanic's lien was commenced more than one year after the date LSI provided its last services. (Record on Appeal (hereinafter "R.") 125-26). The trial court also held that the Claim and Notice of Mechanic's Lien filed by LSI did not comply with mechanic's lien statute. (R. 126). The trial court reached the conclusion that even if LSI had commenced its foreclosure action within the limitation period provided by Utah Code Ann. § 38-1-11, LSI's Notice of Lien was legally insufficient and unenforceable. (R. 126).

II. ISSUES PRESENTED FOR REVIEW

1. Whether an action to foreclose a mechanic's lien filed by a subcontractor more than one year after completion of the subcontract between the subcontractor and the general contractor but within one year after work was suspended for thirty (30) days on the original contract between the general contractor and the owner of the property is within the limitation period provided by Utah Code Ann. § 38-1-11 (1988 & Supp. 1991)

2. Whether the property description contained in a Claim and Notice of Mechanic's Lien substantially complies with Utah Code Ann. § 38-1-7(2)(d) (1988 & Supp. 1991) where the notice of lien informs interested persons that a lien exists on sufficiently identifiable property and the complaining party has not been misled or prejudiced by the notice.

Standard of Review. The applicable standard of review for both issues presented for review in this case is the correction of error standard. This appeal presents two questions concerning how Utah's Mechanic's Lien Law should be applied to this particular undisputed fact situation. Accordingly, this Court should review the trial court's ruling for correctness but accord the trial court's findings no particular deference. This Court is free to render an independent interpretation of the questions of law in this case. See Ron Case Roofing and Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382 (Utah 1989); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884 (Utah 1988); Creer v. Valley Bank & Trust Co., 770 P.2d 113 (Utah 1988); Oates v. Chavez, 749 P.2d 658 (Utah 1988); Bailey v. Call, 767 P.2d 138 (Utah Ct. App. 1989).

III. RELEVANT TEXT OF CONSTITUTIONS, STATUTES AND RULES

UTAH CODE ANN. § 38-1-2 (1988 & Supp. 1991).

"Contractors" and "subcontractors" defined.

> Whoever shall do work or furnish materials by contract, express or implied, with the owner, as in this chapter provided, shall be deemed an original contractor, and all other persons doing work or furnishing materials shall be deemed subcontractors.

UTAH CODE ANN. § 38-1-7(1)-(2)(1988 & Supp. 1991).

Notice of Claim -- Contents -- Recording -- Service on owner of property.

> (1) Each contractor or other person who claims the benefit of this chapter within 80 days after substantial

completion of the project or improvements shall file for record with the county recorder of the county in which the property, or some part of the property, is situated, a written notice to hold and claim a lien.

(2) This letter shall contain a statement setting forth the following information:

(a) the name of the reputed owner if known, or, if not known, the name of the record owner;

(b) the name of the person by whom he was employed or to whom he furnished the equipment or material;

(c) the time when the first and last labor or service was performed or the first and last equipment or material was furnished;

(d) a description of the property, sufficient for identification; and

(e) the signature of the lien claimant or his authorized agent and an acknowledgment or certificate as required under chapter 3, title 57. No acknowledgment or certificate is required for any notice filed after April 29, 1985, and before April 24, 1989.

UTAH CODE ANN. § 38-1-11 (1988 & Supp. 1991).

Enforcement -- Time for -- Lis Pendens -- Action for debt not affected.

Actions to enforce the liens herein provided for must be begun within 12 months after the completion of the original contract, or the suspension of work thereunder for a period of 30 days. Within the 12 months herein mentioned, the lien claimant shall file full record with the county recorder of each county in which the lien is recorded and notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property, or the liens shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action, and the burden of proof shall be upon the lien claimant and those claiming under him to show such actual knowledge.

> Nothing herein contained shall be construed to impair or affect the rights of any person to whom a debt may be due for any work done or materials furnished to maintain a personal action to recover the same.

UTAH CODE ANN. § 38-1-13 (1988 & Supp. 1991).

> **Parties -- Joinder -- Intervention.**
>
> Lienors not contesting the claim of each other may join as plaintiffs, and when separate actions are commenced the court may consolidate them and make all persons having claims filed parties to the action. Those claiming liens who fail or refuse to become parties plaintiff may be made parties defendant, and anyone not made a party may at any time before the final hearing intervene.

RULE 24(a), UTAH RULES OF CIVIL PROCEDURE.

> (a) **Intervention of Right.** Upon timely application, anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

IV. STATEMENT OF THE CASE

A. Nature of the Case. Commencing July 14, 1989, and continuing until October 19, 1989, LSI provided temporary labor services for the construction of a new residence pursuant to an agreement with the general contractor for the project. LSI did not receive payment for its services. On December 14, 1989, within eighty (80) days after furnishing the last labor at the building site, LSI filed the Notice of Lien in the amount of $5,996.67.

On or about February 20, 1991, For-Shor Company ("For-Shor") commenced an action, in part, to foreclose a mechanic's lien on the subject property located at 3941 South Parkview Drive (3915 East), Salt Lake City, Utah (the "Property"). On October 23, 1990, LSI filed a motion to intervene (the "Motion to Intervene") as a defendant and lien claimant pursuant to Utah Code Ann. §§ 38-1-11 and 13.

B. Course of Proceedings and Disposition in the Court Below.

In response to the Motion to Intervene, David W. Early ("Early"), the owner of the Property, filed an Objection to Declaratory Judgment and Motion to Dismiss Cross Complaintant's [sic] Motion to Intervene and Cross Claim (the "Motion to Dismiss") on the grounds that (i) LSI's action to foreclose its mechanic's lien was barred by the 12-month statute of limitation provided by Utah Code Ann. § 38-1-11 and (ii) LSI's Claim and Notice of Lien failed to properly describe the Property.

C. Disposition at Trial Court. The trial court denied LSI's Motion to Intervene and ruled that LSI's Notice of Lien did not comply with the requirements of the Utah Mechanic's Lien Act. The trial court also held that LSI's action to foreclose its lien against the Property was commenced beyond the statutory limitation period and LSI could not be afforded protection under the mechanic's lien statute.

V. STATEMENT OF FACTS

1. Early is a resident of Salt Lake County, State of Utah, and the reputed owner of the Property. (R. 91).

2. On February 8, 1989, Early, as owner, and William Timothy Savage d/b/a Savage Construction Company ("Savage"), as general contractor, entered into an agreement (the "Original Contract") for "the construction of [a] new residence located at Lot #12 [sic] Olympus Park Subdivision, Parkview Drive, Salt Lake City, Utah . . . ." (R. 64).

3. In connection with the Original Contract, Savage and/or Statewide Construction, Inc., of which Savage is an officer and shareholder, and Labor Services, Inc. ("LSI"), entered into a series of contractor/subcontractor agreements (the "Subcontract") wherein Savage agreed to pay LSI for temporary labor services provided to Savage for the completion of the Original Contract on a day-to-day basis. (R. 77-78). The Subcontract referred to the street address but not to the legal description of the Property.

4. Commencing on July 14, 1989, and continuing until October 19, 1989, LSI duly performed in a competent and workmanlike manner the labor and services required by the Subcontract, as a result of which LSI became entitled to receive the amount of $5,996.67. (R. 78).

5. After LSI made demand for payment upon Savage of the $5,996.67 in arrears, Savage informed LSI by letter dated November 16, 1989, that it had removed its equipment and personnel from the

Property as of November 7, 1989, thus suspending work on the Original Contract as of that date. Savage predicated its action on Early's failure to make payments of amounts Early owed to Savage pursuant to the Original Contract. (R. 63).

6. After LSI made repeated demands for payment upon both Savage and Early, LSI filed the Notice of Lien pursuant to Utah Code Ann. §§ 38-1-7(1) on December 14, 1989, within eighty days from the date LSI furnished the last labor in connectior with the construction on the Property. (R. 65-66). The Notice of Lien was recorded in the Salt Lake County Recorder's Office, Entry No. 4860194 in Book 6183 at Page 3032 of the Official Records. The Notice of Lien states that the reputed owner of the land and premises located thereon is David Early, that the reasonable value of the services provided by LSI was in the amount of $5,996.67, and the property to be charged with the lien is located at 3941 South Parkview Drive (3915 East), Salt Lake City, Utah, and more particularly described as "Lot 12 Olympus Park subdivision . . . ." (R. 65-66).

7. The Notice of Lien correctly describes the street address of the Property as 3941 South Parkview Drive, Salt Lake City, Utah. LSI relied on the property description in the Original Contract for the lot number contained in the Notice of Lien. (R. 64). Savage provided LSI with a copy of the Original Contract on November 20, 1989.

8. On or about June 21, 1990, after the expiration of the statutory eighty (80) day period, LSI discovered that the Property is actually located on Lot 112 Mount Olympus Park Subdivision, not Lot 12 Olympus Park Subdivision. (R. 91).

9. On or about February 20, 1990, For-Shor Company ("For-Shor") commenced this action, in part, to foreclose a mechanic's lien on the Early Property. LSI filed its Motion to Intervene pursuant to Utah Code Ann. §§ 38-1-11 and 13 (1987 & Supp. 1990). LSI's Motion to Intervene and Lis Pendens were filed on October 23, 1990. (R. 2-25).

VI. SUMMARY OF ARGUMENTS

LSI COMMENCED THE ACTION TO FORECLOSE ITS MECHANIC'S LIEN WITHIN THE STATUTORY LIMITATION PERIOD AND LSI'S NOTICE OF CLAIM OF MECHANIC'S LIEN SUBSTANTIALLY COMPLIES WITH STATUTORY REQUIREMENTS.

LSI provided labor services in connection with a construction project that directly increased the value of the Early's Property by $5,996.67. LSI has not received payment for its services. LSI, as a subcontractor under the Original Contract between Early, as the Property owner, and Savage, as the general contractor, timely filed its action to foreclose its mechanic's lien on October 23, 1990, less than twelve months after November 7, 1989, the date Savage suspended work on the Original Contract. It is indisputable that LSI, as a subcontractor, filed its foreclosure action within the limitation period provided by Utah Code Ann. § 38-1-11. Even if LSI could be classified as an original contractor, however,

LSI's foreclosure action was still commenced within the limitation period for original contractors.

The description contained in the Claim and Notice of Mechanic's Lien filed by LSI against the subject Property substantially complies with Utah Code Ann. § 38-1-7(2)(d). Under the facts and circumstances of this case, LSI's description of the subject Property provided sufficient identification and gave notice to all interested persons that a lien existed against the Property. In the absence of prejudice to the complainant, and in light of the remedial nature of Utah's Mechanic's Lien Act, the lien should be upheld.

The trial court erred in its application of the mechanic's lien statute. The trial court's determination that LSI's foreclosure action was untimely and that LSI's Claim and Notice of Mechanic's Lien was legally insufficient was incorrect. This Court is free to independently apply the law to the facts presented in this case and correct the errors made by the trial court.

VII. ARGUMENT

LSI COMMENCED THE ACTION TO FORECLOSE ITS MECHANIC'S LIEN WITHIN THE STATUTORY LIMITATION PERIOD AND LSI'S NOTICE OF CLAIM OF MECHANIC'S LIEN SUBSTANTIALLY COMPLIES WITH STATUTORY REQUIREMENTS.

LSI, as a subcontractor, provided services for the completion of a construction project in the amount of $5,996.67 for which it has never received payment. When LSI attempted to foreclose it's mechanic's lien within twelve (12) months after the completion of the Original Contract between the primary contractor and the owner

of the Property, the trial court incorrectly applied the limitation period provided by Utah Code Ann. § 38-1-11. The trial court's error resulted in an unjust denial of the protection afforded by Utah's Mechanic's Lien Law to laborers who have added directly to the value of the property owned by another. It is indisputable that LSI complied with the procedural requirements of Utah's Mechanic's Lien Law and is therefore entitled to the remedy the legislature intended to provide to laborers and materialmen.

A. LSI FILED ITS ACTION TO FORECLOSE ITS MECHANIC'S LIEN AGAINST THE PROPERTY WITHIN THE LIMITATION PERIOD PROVIDED BY UTAH CODE ANN. § 38-1-11.

LSI filed its action to foreclose its mechanic's lien against the Property on October 23, 1990, less than twelve months after the date Savage suspended work on the Original Contract. LSI filed its foreclosure action within the limitation period provided by Utah Code Ann. § 38-1-11.

Section 38-1-11, Utah Code Ann., provides that: "[a]ctions to enforce liens herein provided for must be begun within twelve months after the completion of the original contract, or the suspension of work thereunder for a period of thirty days . . ." (emphasis added). In Roberts v. Hansen, 25 Utah 2d 190, 479 P.2d 345 (1971), this Court noted that the foregoing provision is appropriately considered in connection with Utah Code Ann. § 38-1-2, which defines the term "original contractor" as:

> Whoever shall do work or furnish materials by contract, express or implied, with the owner, as in this chapter provided, shall be deemed an original contractor,

> and all other persons doing work or furnishing materials shall be deemed subcontractors.

Utah Code Ann. § 38-1-2 (1988 & Supp. 1991) (emphasis added).

The completion date or the suspension date, whichever is later, of the "original contract" is the measuring event in determining the timeliness of an action to foreclose a mechanic's lien. The completion or suspension of a subcontract is not relevant to the calculation of the limitation period. Suspension of work on the entire construction project also is not a relevant factor in computing the limitation period. Case law interpreting Utah's Mechanic's Lien Law supports this conclusion.

In Roberts, the plaintiff builder attempted to avoid application of the definition of "original contractor" in order to classify himself as a subcontractor and take advantage of the filing period determined by the completion date of the original contract. In this case, however, the plaintiff builder had an express oral agreement with the Hansens to build a home on real property in Box Elder County that the Hansens were purchasing from the Ballards. The Hansens dismissed the builder on October 25, 1968, before the construction project was completed. Eleven days later the builder filed a notice of lien against property which stated that October 19, 1968, was the last date the builder furnished labor or materials to the property.

The trial court dismissed the action based on the twelve (12) month limitation period which applies to original contracts

under § 38-1-11. The builder did not commence an action to foreclose his lien until November 14, 1969, one-year and two weeks after the builder had last furnished labor and materials to the property. In order to avoid the application of the definition of "the original contract," the builder argued that the primary or "original contract" for construction of a home on the property was between the Hansens (the purchasers) and the Ballards (the sellers). Therefore, the builder reasoned, (i) the Ballards, as holders of the legal title, were the "owners", (ii) the builder's agreement was with the Hansens and he had no contract with the Ballards, (iii) the builder should be regarded as a subcontractor of the Hansens, and (iv) since the home was completed less than one year before he filed his action, his action was commenced on time. Roberts, 479 P.2d at 346.

This Court rejected the builder's argument because the builder's agreement was with the Hansens, as "owners" under § 38-1-2. The Hansens' agreement with the builder was an "original contract" and not a subcontract as the builder contended. Since the "original contract" was terminated on October 25, 1968, more than twelve (12) months before the builder filed his foreclosure action on November 4, 1969, the builder could not obtain the benefit of his lien. Id. The Roberts Court did not expressly address the consequences that might have obtained if the builder could have been classified as a subcontractor, in part, it can be assumed, because the answer is so obvious.

It is clear, however, from the Court's discussion of the interrelatedness of § 38-1-2 and § 38-1-11 that if the plaintiff builder had been a subcontractor rather than the original contractor, the builder's action to foreclose his mechanic's lien would have been timely under § 38-1-11. The statute could not be more clear: The twelve (12) month limitation period provided by § 38-1-11 begins to run upon completion or suspension of the original contract, not the completion or suspension of a subcontract thereunder.

Recently, the Utah Court of Appeals considered a similar set of facts when determining the timeliness of an action to foreclose a mechanic's lien in Govert Copier Painting v. Van Leeuwen, 801 P.2d 163 (Utah Ct. App. 1990). The Court of Appeals upheld the summary judgment dismissing a painting contractor's foreclosure action because the one-year limitation on actions to foreclose mechanics' liens barred the primary contractor's foreclosure action. Although the painting contractor completed his work on February 14, 1986, he contended that construction on the house was not complete until after July 1986, and his foreclosure action filed on June 23, 1987, was within the one-year statutory period.

Judge Billings found it important to note that the painting contractor's alleged contract was directly with the owner. "Copier Painting was thus a primary contractor and not a subcontractor as is often the situation where painting work is performed." Id. at 172, n. 11. The Court of Appeals held that the painting contractor

had completed the performance on its primary contract on February 14, 1986, and the statutory period began to run on that date. "Accordingly, Copier Painting's filing of this action on June 23, 1987, was untimely under section 38-1-11 as it was not filed within twelve months of the completion of the original contract." Id. at 173 (emphasis added). Again, the Court of Appeals did not expressly discuss what the outcome of the case might have been if the painting contractor had been a subcontractor because those facts were not before the court. It necessarily follows, however, that if the painting contractor in this case had not contracted directly with the owner but had supplied materials and labor as a subcontractor, his foreclosure action would have been timely filed.

1. LSI is not an "original contractor" as defined by Utah Code Ann. § 38-1-2.

In the instant case, it is undisputed that LSI is not an original contractor within the meaning of § 38-1-2. Early, as owner, contracted directly with Savage for the construction of a new residence on the Property. (R. 64). LSI did not expressly or impliedly contract with Early. Instead, LSI and Savage entered into a series of subcontractor agreements wherein Savage agreed to pay LSI for temporary labor services provided for the completion of the project. Since LSI never contracted with the Property owner, LSI is not an original contractor.

2. LSI, as a subcontractor, filed its action to foreclose its mechanic's lien within twelve months after Savage suspended work on the original contract.

In this case, the Original Contract between Early and Savage was suspended on November 7, 1989. (R. 63). LSI did not become aware that Early had dismissed Savage until Savage informed LSI by letter dated November 16, 1989. (R. 63). As a subcontractor rather than an "original contractor", LSI had twelve (12) months to file an action to foreclose its mechanic's lien after work on the Original Contract had been suspended for thirty (30) days. A foreclosure action by LSI, therefore, would not have been time barred until December 7, 1989. LSI filed its Motion to Intervene, Lis Pendens, and the Answer, Cross-claim and Counterclaim on October 23, 1990, well within the statutory limitation period provided by Utah Code Ann. § 38-1-11.

3. Even if LSI is regarded as an original contractor, LSI filed its foreclosure action within twelve months after it suspended work on the Property for thirty days.

Even if the Subcontract between LSI and Savage is regarded as an original contract, however, LSI filed its foreclosure action within twelve (12) months after it suspended work on the Property for thirty (30) days. If LSI is regarded as an "original contractor", the statute affords LSI a choice of bringing a foreclosure action within twelve months after the completion of its contract with Savage, or, bringing a foreclosure action within twelve months after there had been a suspension of work for a

period of thirty days, whichever is later. See Mickelsen v. Craigco, Inc., 767 P.2d 561, 563 (Utah 1989), quoting Totorica v. Thomas, 16 Utah 2d 175, 397 P.2d 984 (1965).

In Mickelsen and Totorica, this Court considered the conjunctive language of § 38-1-11 and concluded that such a conjunctive implies a choice. In the earlier case, the Totorica Court considered a foreclosure action commenced by an original contractor more than twelve months after there had been a suspension of work for more than thirty (30) days but less than twelve (12) months after the contract was complete. The Totorica Court concluded that a "lien claimant's" action was not barred just because a suspension of work for thirty (30) days had occurred during any period while the contract was being performed and the contract was not completed for more than twelve (12) months after such suspension of work. Totorica, 397 P.2d at 986-87. More recently, in Mickelsen, the Court reiterated the Totorica holding in a case involving another original contractor in nearly identical factual circumstances.

Neither Totorica nor Mickelsen distinguish between original contractors and subcontractors for the purpose of establishing the limitation period under § 38-1-11 because both cases involve original contractors. Both cases stand or the proposition that the conjunctive language of the statute provides "lien claimants" with a choice between bringing a foreclosure action "twelve (12) months

after the completion of his contract,"[1] or within twelve (12) months after there has been a suspension of work for a period of thirty (30) days, whichever is later. Mickelsen, 767 P.2d at 563.

The Totorica Court based its decision on the rationale that the mechanic's lien law was enacted for the benefit of those who perform the labor and supply the materials and that the lien claimant's remedy should not be limited without a clear mandate from the legislature. Id. at 986. Under the fact situation in the instant case, even if Totorica and Mickelsen are interpreted to mean that the term "original contract" in § 38-1-7 was not intended to be considered in connection with the term "original contractor" in § 38-1-2 as contended by Early, LSI still commenced its foreclosure action within twelve months after November 18, 1989, which was the thirtieth day after work was suspended on the Subcontract between Savage and LSI. There is not, however, a clear mandate from the legislature that § 38-1-2 and § 38-1-11 should not be considered as interrelated provisions and LSI is not an

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[1] In opposition to LSI's Motion to Intervene, Early contended that a "close reading" of the language in Totorica and Mickelsen supports the conclusion "that 'original contractor' does not refer to the contract between the owner and the general contractor but applies to the contract between the subcontractor and the general contractor." (R. 130). Evidently, Early bases his conclusion on the Court's use of the indefinite pronoun "his" when referring to the lien claimant. However, in both Totorica and Mickelsen, the Court was presented with lien claimants who were both primary contractors. Neither case deals with foreclosure actions by subcontractors. Anything more than a mere cursory reading of Totorica and Mickelsen cannot support Early's contention.

"original contractor" for purposes of calculating the limitation period under § 38-1-11.

4. The trial court erred in its application of the limitation period provided by Utah Code Ann. § 38-1-11 to the commencement date of LSI's lien foreclosure action.

The trial court erred in its determination that LSI commenced its action to foreclose its mechanic's lien beyond the limitation period provided by § 38-1-11. As a subcontractor, LSI could bring an action to foreclose its mechanic's lien either twelve months after the Original Contract was complete, or in this case since Savage did not have the opportunity to complete the Original Contract, within twelve months after work had been suspended on the Original Contract for thirty (30) days. Under the correct interpretation of § 38-1-2 and § 38-1-11, LSI commenced its foreclosure action on time. Even if LSI is regarded as an "original contractor," LSI brought its foreclosure action within twelve (12) months after work had been suspended on the Subcontract and the action filed on October 23, 1990, was not time barred.

LSI provided labor services for the construction project on the Property which directly increased the value of the Property. LSI timely filed its action to foreclose its mechanic's lien and is entitled to a determination of the priority of its lien against the Property and satisfaction of its lien from the proceeds of the foreclosure sale of the Property.

B. LSI'S NOTICE OF LIEN IS VALID AND SUBSTANTIALLY COMPLIES WITH UTAH CODE ANN. § 38-1-7.

The property description contained in the Notice of Lien filed by LSI against the subject Property substantially complies with Utah Code Ann. § 38-1-7(2)(d) which requires lien claimants to provide a property description sufficient for identification. LSI's identification of the Property gave notice to all interested persons that a lien was claimed against the Property. In the absence of prejudice to Early, and in light of the remedial nature of Utah's Mechanic's Lien Law, LSI's mechanic's lien should be upheld.

The trial court erred in its determination that the property description contained in the Notice of Lien was legally insufficient for identification purposes. Utah courts have recognized that substantial compliance with the provisions of the mechanic's lien statutes is all that is required of a lien claimant. In this situation, a rigorous interpretation of the mechanic's lien statute in not necessary to protect the interests of the parties. Case law in Utah and several other jurisdictions supports a liberal construction of mechanic's lien laws.

1. Mechanic's lien statutes are liberally construed to give effect to their remedial character.

Projects Unlimited, Inc. v. Copper State Thrift & Loan, 798 P.2d 738 (Utah 1990), is the most recent opinion of this Court regarding the sufficiency of the property description contained in

a notice of mechanic's lien. In that case, a general contractor appealed from a summary judgment invalidating its mechanic's lien against property developed as a condominium project. Several lenders attacked the sufficiency of the description contained in the contractor's lien. Judge Orme, sitting by designation, began his analysis of whether the trial court properly granted summary judgment against the lenders with a thorough discussion of the nature and purpose of Utah's mechanic's lien law.

The purpose of the mechanic's lien act is remedial in nature and seeks to provide protection to laborers and materialmen who have added directly to the value of the property of another by their material or labor. Projects Unlimited, 798 P.2d at 743 (quoting Calder Bros. Co. v. Anderson, 652 P.2d 922, 924 (Utah 1982).[2]

Mechanic's liens are purely statutory, and lien claimants may only acquire a lien by complying with the statutory provisions authorizing them. Projects Unlimited, 798 P.2d at 743; Utah Sav. & Loan Assoc. v. Mecham, 12 Utah 2d 335, 338, 366 P.2d 598, 600 (1961). "However, Utah courts have recognized that substantial compliance with these provisions is all that is required." Projects

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[2] See, e.g., Interiors Contracting Inc. v. Navalco, 648 P.2d 1382 (Utah 1982); Totorica v. Thomas, 16 Utah 2d 175, 397 P.2d 984 (1965); King Bros. v. Utah Dry Kiln Co., 374 P.2d 254 (Utah 1962); Stanton Transportation Co. v. Davis, 341 P.2d 207 (Utah 1959); Rio Grande Lumber Co. v. Darke, 50 Utah 114, 167 P. 241 (1918); Bailey v. Call, 767 P.2d 138 (Utah Ct. App. 1989).

Unlimited, 798 2d at 743-44 (emphasis added); Graff v. Boise Cascade Corp., 660 P.2d 721, 722 (Utah 1983); Chase v. Dawson, 117 Utah 295, 296, 215 P.2d 390,390 (1950). "Moreover, we have stated that '[a] lien once acquired by labor performed on a building with the consent of the owner should not . . . be defeated by technicalities, when no rights of others are infringed, and no express command of the statute is disregarded.'" Projects Unlimited, 798 P.2d at 744 (quoting Eccles Lumber Co. v. Martin, 31 Utah 241, 249, 87 P. 713, 716 (1906)). Courts of other states also subscribe to this view. See, e.g., H.A.M.S. Co. v. Electrical Contractors of Alaska, Inc., 563 P.2d 258, 263 (Alaska 1977); Horseshoe Estates v. 2M Co., 713 P.2d 776 (Wyo. 1986).

"Although courts have differing opinions about how liberally to construe provisions within their mechanic's lien statutes, 'the modern trend is to dispense with arbitrary rules which have no demonstrable value in a particular fact situation.'" Projects Unlimited, 798 P.2d at 744 (quoting Consolidated Elec. Distribs., Inc. v. Jepson Elec. Contracting, 272 Ore. 376, 380, 537 P.2d 80, 83 (1975)). Courts repeatedly hold that labor and materialman's lien laws should be liberally construed and applied in order to reasonably and fairly carry out their remedial intent. See Adobe Brick and Supply Co. v. Centex-Winston Corp., 270 So.2d 755, 757 (Fla. 1972)(omission or error in claim of lien does not prevent enforcement of lien as long as property can be identified from description); General Electric Supply Co. v. Bennett, 626 P.2d 844,

846 (Mont. 1981)(whether given description is sufficient depends of surrounding circumstances); Lewis v. Midway Lumber, Inc., 561 P.2d 750, 755 (Ariz. Ct. App. 1977)(substantial compliance not inconsistent with remedial nature of mechanic's lien law); C-3 Builders, Inc. v. Krueger, 642 P.2d 344, 345 (Ore. Ct. App. 1982)(substantial compliance with statutory requirements sufficient). Utah is no exception to the modern trend.

In Projects Unlimited, Judge Orme noted that Utah has followed the modern trend in the legislature and the courts. The 1985 amendments to the mechanic's lien law simplified the mechanic's lien notice and in Mickelsen v. Craigco, Inc., 767 P.2d 561 (Utah 1989), this Court dispensed with the notion that the claimant's verification required any formal ritual. Id. at 563.

In Midway Lumber, the court found that a liberal construction of the Arizona mechanic's lien statute (identical to Utah's statute) meant that the steps required to impose a mechanic's lien "must be followed, but in determining what these steps are the court should give the words a meaning which is reasonable, consistent with all the language used, and conducive to the purpose to be accomplished by the enactment of the statute." Midway Lumber, 561 P.2d at 755.

Courts generally eschew a technical approach to property descriptions in notices of claims. Lien statutes "must be liberally construed with a view to effect their objects and to promote justice." Treasure Valley Plumbing and Heating Inc. v.

Earth Resources Co., 684 P.2d 322 (Idaho 1984); Chief Indus., Inc. v. Schwendiman, 587 P.2d 823 (Idaho 1978). Courts do not interpret the various, but similar mechanic's lien statutes to require a technical legal description. Adobe Brick, 270 So.2d at 757; C-3 Builders, 642 P.2d at 345; Fircrest Supply, Inc. v. Plummer, 634 P.2d 891, 893 (Wash. App. 1981).

LSI clearly has established its right to protection under Utah's Mechanic's Lien Law by complying with all applicable procedural requirements. LSI's Notice of Lien contained a property description sufficient to identify the Property. Denying LSI the benefit of its mechanic's lien based on a technicality would be inconsistent with the remedial nature of Utah's Mechanic's Lien Law and the trend toward liberal construction of this statute to accomplish this remedial purpose.

2. Any error or mistake in the property description does not affect the validity of the lien if the property can be identified by the description.

Sections 38-1-7 and 38-1-8 of Utah's mechanic's lien statute identify the statutory elements of a lien notice. At the time this dispute arose, § 38-1-7(2)(d) provided that every notice of lien recorded with the county recorder must contain, among other things, "a description of the property, sufficient for identification." Utah Code Ann. § 38-1-7(2)(d). In Projects Unlimited, Judge Orme noted that the descriptive terms in a lien notice is to adequately inform interested parties of the existence and scope of the lien. Projects Unlimited, 798 P.2d at 747; see also Park City Meat Co. v.

Comstock Silver Mining Co., 36 Utah 145, 155, 103 P. 254, 260 (1906). "Courts look to see whether interested parties have been informed of the existence of the lien and whether the lien has misled or prejudiced those parties. Beall Pipe & Tank Corp. v. Tumac Intermountain, Inc., 108 Idaho 487, 490, 700 P.2d 109, 112 (Ct. App. 1985); Horseshoe Estates v. 2M Co., 713 P.2d 776, 781 (Wyo. 1986)(lien which contained "no adequate description of the property" upheld where not claim of prejudice or being misled). "When lien notices have sufficiently informed interested persons that a lien exists on identifiable property and the complaining party has not been misled by the notice, the purpose of the provisions has not been thwarted and courts are inclined to find substantial compliance." Projects Unlimited, 798 P.2d at 747; see e.g., Horseshoe Estates, 713 P.2d at 781.

a. A property description is sufficient if persons familiar with the locality can identify the property from the description.

Other jurisdictions that have considered this issue have created a substantial body of law regarding the sufficiency of the property description required in a claim and notice of mechanic's lien. Based on a foundation of liberal construction, courts consistently hold that if the description of the property contained in the lien notice is sufficient to enable a person of ordinary intelligence, who is familiar with the locality, to point it out as the only one corresponding with the description, it meets all the statutory requirements. General Electric Supply, 626 P.2d at 846;

Treasure Valley, 684 P.2d at 325; Turnboo v. Keele, 383 P.2d 591, 593 (Idaho 1963); Howard A. Deason & Co. v. Costa Tierra Ltd., 83 Cal. Rptr. 105, 114 (Cal. Ct. App. 1969). In seeking to determine if a party familiar with the locality can identify the property from the description, "whether a given description is sufficient or not depends upon the surrounding circumstances, the character of the particular building, its situation with reference to others, etc." General Electric Supply, 626 P.2d at 846; Midland Coal & Lumber Co. v. Ferguson, 202 P. 389, 390 (Mont. 1921).

The Texas Supreme Court considered a factual situation almost identical to the instant case in Rheem Acceptance Corp. v. Rowe, 332 S.W.2d 353 (Tex. 1959). In Rheem, the parties agreed that the only issue to be decided on a motion for summary judgment was the sufficiency of a lien description in a lien contract that correctly recited the street address but described the property as "Lot #9" where the proper description was "Lot #19". The court summarily decided that as between the lien holder and the original owner of the property, the lien containing the correct street address was absolutely valid and enforceable against the original owner. The Rheem court adopted the "best rule" that if there appears to be enough in the description to enable a party familiar with the locality to identify the premises to the exclusion of all others, the description will be sufficient. Id. at 355. The court took judicial notice of the fact that there would not be two houses in the same city of Irving, Dallas County, that had the same street

address. "Certainly such a description would have been sufficient to enable a party familiar with the location to identify the premises intended to be described with reasonable certainty." Id. The only difference between Rheem and the instant case is the involvement of a third-party subsequent purchaser in Rheem. In this case, only LSI and Early, the Property owner, are involved. LSI's Notice of Lien correctly identified the street address of the Property and Early had actual notice of LSI's lien against the Property. Certainly Early cannot argue that he was confused as to the property involved.

b. A property description is sufficient if after elimination of the erroneous portion, enough remains to identify the property sought to charged with the lien.

In cases where the property description contained in a notice of lien contained error, several courts have upheld liens if, by rejecting what is erroneous in the description contained in the lien, enough remains to identify the particular property sought to be charged. General Electric Supply, 626 P.2d at 846; Howard A. Deason & Co., 83 Cal. Rptr. at 114. Using the correct portion of the description contained in LSI's Notice of Lien, the Property is described as 3941 South Parkview Drive (3915 East), Salt Lake City, Utah. There is only one address is Salt Lake City that corresponds with the street address contained in LSI's Notice of Lien. It is clear that a person familiar with this locality could identify the property subject to LSI's claim of lien using only the correct

street address contained in the Notice of Lien. The property description contained in LSI's Notice of Lien substantially complies with the requirement that the lien contain a description sufficient to identify the subject property.

It is important to note that this is not a case where the property description is unambiguously erroneous. In other words, the description of the premises charged with the lien does not clearly identify the wrong parcel to the exclusion of all others. For example, in Ross v. Olson, 523 P.2d 518 (Idaho 1974), improvements were made to one portion of a large parcel of property and the mechanic's lien positively and exactly identified the wrong portion of the parcel. The court ruled that the lien claimant had not achieved substantial compliance with the lien statute and the lien was fatally defective. See also, Brunecz v. DiLeo, 283 A.2d 606 (Md. Ct. App. 1971); Banco Mortgage Co. v. E.G. Miller Enters., 264 N.W.2d 399, 400 (Minn. 1978); DiCamillo v. Navitsky, 386 N.Y.S.2d 585 (N.Y. Sup. Ct. 1977); Sequatchie Concrete Serv., Inc. v. Cutter Labs, Inc., 616 S.W.2d 162 (Tenn. Ct. App. 1980).

In the instant case, there is not a positive or unambiguous description of the wrong piece of property. The Notice of Lien contains the correct street address and identifies Early as the owner. The only error contained in the Notice of Lien was the omission of the numeral one (1) from the lot number and the word "Mount" from the name of the subdivision. By comparison, in cases where the lien claimant made a completely incorrect identification,

the lien was invalid because it failed to provide any notice of the property that was charged with the lien. The discrepancy between the lot number and the street address creates ambiguity in the description rather than positively identifying the wrong property. The Notice of Lien still provides an adequate description sufficient to identify the property charged with the lien. Any question in this regard is eliminated by the presence of Early as the only party involved, Early's actual notice of the existence of LSI's mechanic's lien and the absence of innocent subsequent purchasers.

3. LSI is in substantial compliance with Utah Code Ann. § 38-1-7 and LSI's lien against the Early Property is valid and enforceable.

Substantial compliance with the mechanic's lien statutes is consistent with the remedial nature of the statute has been found to be sufficient to create a valid and enforceable mechanic's lien. Projects Unlimited, 798 P.2d at 743-44; Leeson v. Bartol, 99 P.2d 485 (Ariz. 1940); Midway Lumber, 561 P.2d at 755; Banco Mortgage, 264 N.W.2d at 400; Morrison-Maierle, Inc. v. Selsco, 606 P.2d 1085, 1087 (Mont. 1980).

a. Lack of prejudice to the complainant or third-parties is an important factor when considering whether the property description contained in LSI's Notice of Lien substantially complies with Utah Code Ann. § 38-1-17.

In discussing the factors of importance in determining whether there has been substantial compliance in a given case, the Oregon Supreme Court approved the following language from the

Indiana Court of Appeals in Beneficial Finance Co. v. Wegmiller Bender Labor Co., 402 N.E.2d 41 (Ind. Ct. App. 1980):

> Whether there has been substantial compliance by the lien claimant depends upon the degree of non-compliance with the letter of the statute, the policy which underlies the particular statutory provision in question, and the prejudice which may have resulted to either the owner of the property or other third parties who have an interest in the real estate.

McGregor Co. v. Heritage, 631 P.2d 1355, 1357 (Ore. 1981). The McGregor court also noted that the Indiana holding was consistent with prior Oregon cases in recognizing that lack of prejudice to the owner or third-party subsequent purchasers is a proper factor to consider in determining whether a lien claimant has substantially complied with the statutory requirements. See, e.g., C-3 Builders, 642 P.2d at 346; Horseshoe Estates v. 2M Company, Inc., 713 P.2d 776, 781 (Wyo. 1986); Buckeye Hauling, Inc. v. Troy, 43 Ohio Misc. 23, 332 N.E.2d 776, 779 (Com. Pl. 1974).

Turning to the facts of this case, only LSI, and Early, are involved. No subsequent purchaser has been misled to his or her detriment by the incorrect description, and the owner himself could not have been misled by the incorrect Lot number contained in the Notice of Lien. In this case, Early himself perpetuated the erroneous identification of the building lot by incorrectly identifying the lot in the Original Contract (R. 64) and in a

letter addressed to "All Suppliers & Subcontractors" dated October 2, 1989. (R. 134).[3]

Although the Notice of Lien referred to Lot 12 Olympus Park Subdivision rather than Lot 112 of the Mount Olympus Park Subdivision, the deficiency in the description did not result in any prejudice to Early. In compliance with Utah Code Ann. § 38-1-7(3), LSI provided Early with notice that his property had been charged with a mechanic's lien by letter dated February 9, 1990, and delivered by certified mail. The Property is the subject of substantial dispute and Early could not have been misled by the minor inaccuracies in the Notice of Lien. Furthermore, Early had actual notice of LSI's lien. Even though the description contained the wrong building lot number, the description was still sufficient to enable Early to identify the property covered by LSI's lien.

4. The trial court erred in its determination that the property description in LSI's Notice of Lien was not legally sufficient for purposes of Utah's Mechanic's Lien Law.

Contrary to the trial court's Ruling that the "whole purpose of the notice of lien is for recording purpose" (R. 126), the real purpose of the lien notice is to inform interested persons that a

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[3] LSI did not receive a copy of the October 2, 1989, letter from Early to suppliers and sub-contractors. The letter is attached to Early's Reply Memorandum as Exhibit "2". (R. 134). Although LSI did not rely on the property description contained in the October 2 letter, the letter is further evidence that Early was not misled by the description contained in LSI's Notice of Lien because he consistently referred to the Property as Lot #12 rather than Lot #112.

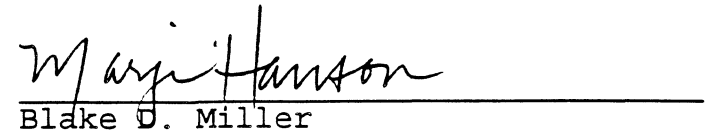
lien exists on identifiable property. In this particular case, the Notice of Lien filed by LSI fulfills that purpose and is legally sufficient under Utah Code Ann. § 38-1-7. Moreover, in light of (i) the general purpose of Utah's mechanic's lien law to protect those who perform labor and provide materials on buildings of others, (ii) Early's ability to identify the subject property from the description given in the Notice of Lien and, (iii) the lack of prejudice to Early or any other third-party, it is apparent that the trial court erred in its determination that the Notice of Lien was legally insufficient. LSI's Notice of Lien substantially complies with the provisions of the Utah's Mechanic's Lien statutes and should be upheld by this Court.

VIII. CONCLUSION

Accordingly, LSI requests this Court to reverse the trial court's Order and Ruling and allow LSI to intervene in the above-entitled action to determine the validity and priority of LSI's claim and the claims of all other lien holders as provided by law. LSI also requests an award of reasonable attorneys fees and costs of appeal as provided by Utah Code Ann. § 38-1-18 (1988 & Supp. 1991).

DATED: June 24, 1991.

HANSEN JONES & LETA



Blake D. Miller
Marji Hanson
Attorneys for Labor Services, Inc.
Appellants and Putative Intervenors

CERTIFICATE OF SERVICE**

I hereby certify that on June 24, 1991, I caused to be hand-delivered a true and complete copy of the foregoing document to the following:

Allan M. Metos
Counsel for Respondent David W. Early
Parkview Plaza, Suite 260
2180 South 1300 East
Salt Lake City, Utah 84106

\mh\lsibrief.1

** The Brief of Appellant was inadvertently filed without a reproduction of the trial court's order and ruling as required by Utah Rule of Appellate Procedure 24(f)(1). The Order Denying Motions to Intervene and for Declaratory Judgment dated December 6, 1990, and the Ruling on Labor Service [sic] Inc.'s Motion to Intervene dated November 19, 1990, are attached hereto as Addendum "A" and "B", respectively.

Tab A

ALLAN M. METOS #2249
Attorney for Defendant
David W. Early
Parkview Plaza, Suite 260
2180 South 1300 East
Salt Lake City, Utah 84106
Telephone: (801) 363-5796

IN THE THIRD JUDICIAL DISTRICT COURT

FOR SALT LAKE COUNTY, STATE OF UTAH

---oooOooo---

FOR-SHOR COMPANY, a Utah corporation, Plaintiff, vs. DAVID W. EARLY, TRUSTEE; SAVAGE CONSTRUCTION COMPANY; STATEWIDE CONSTRUCTION; and TIM SAVAGE; Defendants.	ORDER DENYING MOTIONS TO INTERVENE AND FOR DECLARATORY JUDGMENT Civil No. 900901033 CV Judge Russon
LABOR SERVICES, INC. a Utah corporation, Cross-Claimant, vs. DAVID W. EARLY, TRUSTEE; SAVAGE CONSTRUCTION COMPANY; STATEWIDE CONSTRUCTION; and TIM SAVAGE; Cross-Claimees.	

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This matter having come on regularly for hearing this 19th day of November, 1990, before the Honorable Leonard H. Russon, one of the judges of the above-entitled Court on the Motions of

Labor Services, Inc. to intervene and for a declaratory judgment and submitted to the Court for decision under Rule 4-501, Utah Code of Judicial Administration, and the Court being fully advised in the premises and good caused appearing therefore;

IT IS HEREBY ORDERED that Labor Services, Inc.'s Motions for Declaratory Judgment and to Intervene in the above action are denied on the following grounds:

(1) Labor Services, Inc. failed to file its action on the lien within twelve (12) months after completion of its original contract as required by 38-1-11 U.C.A.

(2) Labor Services, Inc.'s Notice of Mechanic Lien did not contain a sufficient legal description of the property liened as required by 38-1-7 U.C.A.

DATED this 27 day of November, 1990.

Judge

CERTIFICATE OF MAILING

I hereby certify that on this ___ day of November, 1990, a true and correct copy of the foregoing Order Denying Motions to Intervene and for Declaratory Judgment was mailed by first-class mail, postage prepaid, to the following:

Duane A. Burnett
Attorney for Plaintiff
367 West 1600 South
Salt Lake City, Utah 84115

Blake D. Miller, Esq
Attorney for Labor Services, Inc.
50 West Broadway, Sixth Floor
Salt Lake City, Utah 84101

Tab B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

FOR-SHOR COMPANY, a Utah corporation,	:	RULING ON LABOR SERVICES INC.'S MOTION TO INTERVENE
Plaintiff,	:	CIVIL NO. 900901033 CV
vs.	:	
DAVID W. EARLY, TRUSTEE; SAVAGE CONSTRUCTION COMPANY; STATEWIDE CONSTRUCTION; and TIM SAVAGE,	:	
Defendants.	:	

Labor Services, Inc. has filed a Motion to Intervene, for Declaratory Judgment, and for Leave to File a Crossclaim in the above matter. The said Motions have been submitted to the Court for decision pursuant to Rule 4-501 of the Utah Code of Judicial Administration.

This action is a foreclosure action on two mechanic's liens brought by plaintiff For-Shor Company. The mechanic's liens pertain to plaintiff's materials utilized by other defendants on property owned by David W. Early, Trustee. Labor Services, Inc. moves to intervene on the basis of its own mechanic's lien as to services performed on the said property. Labor Services,

Inc.'s services were rendered on the property, commencing July 14, 1989 and continuing until October 19, 1989. Its Motion to Intervene was filed October 23, 1990.

Defendant David W. Early, Trustee, objects to the intervention upon the grounds that the Complaint was filed more than one year after the last services had been performed and, therefore, was statutorily barred. It further argued that the lien, itself, was not legally adequate in that it incorrectly identified the property being liened, therein failing to comply with the requirements of the mechanic's lien statute.

Labor Services Inc. argues that while it filed its Motion after the one year period, other mechanic's lienholders had filed the action within the one year period, that being on February 20, 1990. It also argues that its error in identifying the lot in the subdivision to be Lot 12 instead of Lot 112 was not an error sufficient to nullify the validity of the lien.

The Court rules as follows. Labor Services, Inc.'s claim and Notice of Mechanic's Lien does not comply with the requirements of the mechanic's lien statute. To derive the benefits of the mechanic's lien statute, a notice of lien must be filed "for record with the county recorder" and must

contain, among other things, "a description of the property, sufficient for identification." The said notice was insufficient to give notice of lien upon Lot 112, Olympus Park Subdivision. The inclusion of the address does not cure the statutory requirement since the whole purpose of the notice of lien is for recording purposes and the county recorder does not file by address of property, but by legal description.

Furthermore, Legal Services, Inc.'s action upon its lien was commenced more than one year after the last services of October 19, 1989. Even if the notice of lien had been legally sufficient, the action taken by Labor Services, Inc. on October 23, 1989 was beyond the limitation period.

For the reasons set forth above, Labor Services, Inc. has no protection under the mechanic's lien statute. Of course, it may still pursue its rights against the parties with whom it contracted on the debt.

Labor Services, Inc.'s Motion to Intervene is denied.

Counsel for David W. Early, Trustee, will prepare the Order.

Dated this 14th day of November, 1990.

LEONARD H. RUSSON
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Ruling on Motion to Intervene, to the following, this 27 day of November, 1990:

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